

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA

v.

NATHAN CRAIGUE

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19-cr-142-01-LM

November 15, 2021

3:37 p.m.

**SEALED** TRANSCRIPT OF ORAL ARGUMENT  
BEFORE THE HONORABLE LANDYA B. MCCAFFERTY

APPEARANCES:

For the Government:

Aaron G. Gingrande, AUSA  
U.S. Attorney's Office

For the Defendant:

Behzad Mirhashem, Esq.  
Federal Defenders Office

Theodore M. Lothstein, Esq.  
Lothstein Guerriero, PLLC

Intervenor:

Donna J. Brown, Esq.  
Wadleigh, Starr & Peters, PLLC

Court Reporter:

Susan M. Bateman, RPR, CRR  
Official Court Reporter  
United States District Court  
55 Pleasant Street  
Concord, NH 03301  
(603) 225-1453

1 P R O C E E D I N G S

2 THE CLERK: For the record, this is a sealed motion  
3 hearing in United States versus Nathan Craigue. It is  
4 19-cr-142-01-LM.

5 THE COURT: All right. Let me just start by asking  
6 everybody to use John Doe as the name of the individual at  
7 issue.

8 The reason this hearing is under seal is I want you  
9 to feel confident and comfortable explaining whatever the  
10 argument is you want to explain to me about John Doe, but the  
11 issue is obviously his protection.

12 And at this point having great familiarity  
13 obviously with Craigue and having reviewed Attorney Brown's  
14 motions, and my obligation is obviously to protect the  
15 public's right of access, I have weighed everything. I'm not  
16 ready to rule because I want to hear from counsel, and I  
17 appreciate you, Attorney Lothstein, jumping in and  
18 representing John Doe at this hearing.

19 I am -- it is my intent at this point to protect  
20 him -- to the extent I can, protect him by using John Doe,  
21 sealing his name, and sealing any other identifying  
22 information, and that is what I think balances the public's  
23 right of access here.

24 I know the government wants to argue that I should  
25 seal additional materials related to his cooperation, so I

1 want to hear from the government.

2 I want to hear from Attorney Brown, Attorney  
3 Mirhashem, and Attorney Lothstein to the extent you take a  
4 position on this, and I want to focus it if we could on the  
5 issue of right now what frankly was under seal still until I  
6 issued that temporary seal order in my most recent order.  
7 That is temporary until ultimately I decide what to do after  
8 this hearing, but up until that moment the grand jury payment  
9 was always public.

10 The cooperation is what I know the government has  
11 sought to keep private in subsequent post trial motions and  
12 requests which I granted along the way.

13 And then Attorney Brown filed a motion to intervene  
14 and seeking to have more matters made public.

15 So let me hear from the government first on this,  
16 and then I'll let Attorney Lothstein, Attorney Brown, and  
17 Attorney Mirhashem respond.

18 Go ahead.

19 MR. GINGRANDE: Thank you, your Honor.

20 For the record, this is AUSA Aaron Gingrande on  
21 behalf of the government.

22 Just before we get into the substance of this, your  
23 Honor, I did want to give an opportunity to Attorney Brown to  
24 perhaps give an update to the Court about the status of her  
25 representation of Mr. Alrai in this case.

1           It's come to my attention that there has been a  
2 motion to withdraw her representation of Mr. Alrai, but I am  
3 not the one in the best position to provide that update.

4           I appreciate you giving me the opportunity to speak  
5 first, but I did want to give that opportunity to Attorney  
6 Brown just because it could affect these proceedings.

7           THE COURT: Go ahead, Attorney Brown.

8           MS. BROWN: Thank you, your Honor.

9           I'll preview this by giving you a brief summary of  
10 the status of counsel in Mr. Alrai's case. It's probably  
11 humanly impossible, but I will do the best I can. It's very  
12 complicated right now in terms of motions to be appointed and  
13 other complicating factors. We filed a fairly lengthy motion  
14 about a week or so ago.

15           I understand my ethical duties is that unless and  
16 until we, meaning my office, is allowed to withdraw from the  
17 case that we are counsel of record.

18           I discussed that with Mr. Alrai last week. I don't  
19 remember what day it was. I think it was toward the end of  
20 the week or whatever, but I did discuss with him that it was  
21 my position that we would go forward with this. He assented  
22 to that even though there was a pending motion to withdraw,  
23 and that's why I'm going forward because some of the -- Mr.  
24 Alrai is weighing all the factors. It's his interest to move  
25 forward with this and not have this delayed. And as I said,

1 my ethical obligation is to protect his interest unless and  
2 until the issue regarding my status of counsel is resolved.

3 THE COURT: Okay. All right.

4 Attorney Gingrande, go ahead.

5 MR. GINGRANDE: Okay. Great.


6 I was just -- you know, my only further thing that  
7 I wanted to kind of I guess raise before the Court is just the  
8 issues surrounding the reasons for that motion to withdraw as  
9 counsel. I do understand that they involve potential  
10 conflicts of interest and a potential for ineffective  
11 assistance, and so I did want to make sure that was before the  
12 Court before proceeding and again give the opportunity to  
13 Attorney Brown if there was something more on the record she  
14 wanted to say about that. I'm not sure of the Court's  
15 familiarity with the reasons for that withdrawal.

16 THE COURT: Okay. Well, I'm not seeing as though  
17 it's going to do anything to affect my ruling in this matter.  
18 So I would like to move along unless there is somebody else  
19 who sees some reason why that should affect the public's right  
20 of access.

21 I know Mr. Alrai has issues. He's got a separate  
22 case. I know that one of your allegations too was that the  
23 government and Attorney Brown had made some agreement that  
24 Attorney Brown would not file a motion to intervene if certain  
25 things were handed over. Well, Mr. Alrai cannot bargain away

1 the public's right of access. So we're here. I am going to  
2 rule on the issue of access and the First Amendment issues at  
3 stake. So that's what I'm concerned with at this point.

4 Attorney Gingrande, I know that it was the  
5 government that really did want to keep the cooperation piece  
6 of this under seal, and so long as I am keeping his identity  
7 under seal, his name, and any other identifying information,  
8 and I would include in that, you know, his age, his place of  
9 residence, things that people could identify him easily with,  
10 his educational background, his job history with the exception  
11 of having worked for Craigue & Sons obviously, specific  
12 people -- I think it was Attorney Mirhashem at different  
13 chambers conferences or different hearings that we had after  
14 John Doe's testimony, I think certain people he cooperated  
15 against might have been mentioned at different times, I would  
16 certainly redact that from any public record. There were

17   
18 testified had died. Those would identify him I think  
19 potentially. That kind of identifying information I would be  
20 I think favorably disposed to keep under seal because that  
21 could identify who he is, but beyond that I know you wanted  
22 the entirety of the cooperation piece redacted and kept under  
23 seal.

24 Are you still maintaining that position?

25 MR. GINGRANDE: Well, I think the only thing that,

1 you know, maybe I would want to kind of further hone in on is  
2 just how we're defining identifying information as it relates  
3 to the confidential -- the piece about being a confidential  
4 informant.

5 You know, the very fact of the existence of a  
6 confidential informant being a confidential informant in this  
7 case is -- in my opinion and the opinion of the government I  
8 think it's -- if we can truly effectively prevent the public  
9 from knowing who the confidential informant is, no, I don't  
10 have a problem with that.

11 My concern, especially in light of Alrai's  
12 counsel's motion, is that the attention is already on John Doe  
13 right now. The attention is on John Doe because the public  
14 motion that was filed cites in various places the fact that  
15 the government dismissed the case in relation to the testimony  
16 of a witness who had a Fifth Amendment issue, had an issue  
17 involving the voir dire and was voir dired, and there's  
18 additional information that directly points to John Doe as  
19 being the reason for the dismissal of the case.

20 And so if we then reveal that there's a  
21 confidential informant in the case, the natural inference I  
22 think the public can draw is that, oh, it's that witness, that  
23 same witness.

24 THE COURT: A witness the government called to the  
25 witness stand in a public trial when you knew that he was a

1       cooperator. That witness.

2               MR. GINGRANDE: Oh, no, we did not know that he was  
3       a cooperator.

4               THE COURT: The government knew. The government --  
5       the Concord Police Department certainly knew. The  
6       prosecutorial entity of the case at the front end certainly  
7       knew.

8               I'm not saying that you, Attorney Gingrande, or  
9       Attorney Davis knew. I have absolutely no understanding that  
10      that is true. I firmly believe that you did not know that,  
11      that you discovered it as the Court did, as Attorney Mirhashem  
12      did, but the fact is that the prosecutorial misconduct in this  
13      case stems from the fact that you did not research that, you  
14      did not make any efforts to find that out, and ultimately you  
15      decided to file a motion to dismiss right before Attorney  
16      Mirhashem would have been cross-examining him. So that was a  
17      decision made ultimately by the government in this case.

18              The government received the case from the Concord  
19      Police Department, am I wrong about that, and from the  
20      Merrimack County Attorney's Office?

21              MR. GINGRANDE: So just to focus in on your  
22      question, your Honor, you're asking -- specifically you're  
23      asking me if I know how the case was adopted by the  
24      government?

25              THE COURT: My understanding is the Concord PD was



1 on the scene right away investigating the case and there was  
2 a Concord --

3 MR. GINGRANDE: I think that's right in terms of  
4 Concord PD being on the scene.

5 I do believe that in terms of our reason for being  
6 involved with the case it was actually not a case that was --  
7 again, this is my understanding.

8 I should say that I was not part of this office  
9 when the case was initially taken on, but my understanding is  
10 that we received the case because this was a case involving  
11 OSHA, and the Concord PD -- at least aspects of this case the  
12 Concord PD was not pursuing. And so my understanding is that  
13 it was the Department of Labor was how we came to take on this  
14 case, but I'm not sure of the exact details and I honestly  
15 don't know if it's particularly relevant to what you're trying  
16 to get at, your Honor.

17 THE COURT: Well, what I'm trying to get at is  
18 ultimately the government called this witness to the stand in  
19 your case in chief to testify against the defendant.

20 MR. GINGRANDE: Yeah, and this is true. We  
21 certainly did call him to the stand.

22 In terms of -- you know, when it comes to the issue  
23 that we're trying to, you know, focus on today, it's about  
24 protecting this witness in light of what has happened in the  
25 government's position, and it's about now that he has been

1 brought to the stand, now that he has testified, now that the  
2 case has been dismissed, now that the information has come out  
3 regarding, you know, John Doe's position and his testimony,  
4 where do we go from here. And the interest that the  
5 government has, as stated consistently, is trying to protect  
6 this witness.

7 As your Honor already pointed out, you know, the  
8 fact that there's an allegation of prosecutorial misconduct is  
9 certainly something that is part of the public record already  
10 and it's not something that the government is trying to hide.  
11 That is public. That deserves to be public.

12 But the identity of the confidential informant the  
13 government believes should not be made public, and there are  
14 very compelling reasons that that should be the case, not the  
15 least of which starts with Roviaro and the informant's  
16 privilege.

17 So the government's position in this matter is that  
18 it is Mr. Alrai's burden to show why the public access in this  
19 case overcomes that privilege, and in this case Mr. Alrai has  
20 not met that burden.

21 As a preliminary issue, the government has included  
22 just for the sake of background how it was that the government  
23 came to file a motion to grant access to Mr. Alrai to the  
24 documents in this case, and Mr. Alrai has been granted the  
25 access that he needs to litigate his defense in this matter

1 fully. He has been given access to the sealed documents with  
2 only minimal redactions to the name of John Doe, and he has  
3 had access to those documents now for weeks and therefore has  
4 the ability to litigate the case which was the original -- the  
5 reason for the agreement with counsel.

6 Now, counsel has phrased it, and I've cited this  
7 many times, as an alternative to filing a public motion, and  
8 it was precisely because the government wanted to keep the  
9 protection -- keep protected the identity of the confidential  
10 informant that we agreed to proactively make that motion to  
11 get Mr. Alrai the access that he needed to litigate his case  
12 and that the Court granted by modifying the protective order  
13 on August 3rd, and it was subject to Alrai's counsel's promise  
14 and Mr. Alrai's that they would be subject to the -- that the  
15 documents would be produced subject to the protective order.

16 So what happened after that was with the benefit of  
17 having those -- we produced those documents. The Court, you  
18 know, issued its ruling, we produced the documents, and with  
19 the benefit of reviewing all that information and with the  
20 benefit of knowing because the redactions were so minimal or  
21 at least being able to infer who John Doe was as was cited in  
22 Exhibit C to our opposition as showing kind of counsel's  
23 knowledge of who John Doe is, then Alrai's counsel files the  
24 motion at issue here despite the parties' agreement and  
25 further focused the spotlight on this witness and did so by

1 pointing out that this witness was at the heart of the  
2 dismissal. This witness had an issue with the Fifth  
3 Amendment, was subject to voir dire, et cetera. That is in  
4 the opinion of the government identifying information about  
5 this witness.

6 And so that is the basis for the government's  
7 concern of now unsealing the information related to the fact  
8 that there is a confidential informant in this case. It will  
9 be very easy for members of the public to put two and two  
10 together and look at, okay, the witness involved here had a  
11 Fifth Amendment issue, that's on the public record, the  
12 witness involved here was represented by Attorney Lothstein  
13 and was subject to a voir dire, and that's on the public  
14 record, and that same witness was the witness who is a  
15 confidential informant.

16 And so it is for that reason that the government  
17 strongly, strongly feels that that information should remain  
18 under seal.

19 Your Honor, we would agree to the other  
20 information. Again, information of allegations of  
21 prosecutorial misconduct, information related to, you know,  
22 other things that are contained in those transcripts that do  
23 not speak to the witness -- a witness being a confidential  
24 informant, we would agree that that information is information  
25 that the public deserves to access.

1 But it is because of that very real risk of  
2 reprisal and harm both reputationally and possibly physically  
3 to this witness that the government is seeking to keep that  
4 information under seal and/or redacted.

5 And it's also in line with the public interest in  
6 Roviaro and other cases that protect that type of information  
7 that informants provide in order to facilitate communication  
8 between citizens who have seen violations of law or know  
9 information about violations of law communicating with law  
10 enforcement and not having a chilling effect on that.

11 So that is the reason, your Honor, that we are  
12 concerned about this information coming to light.

13 THE COURT: All right. Let me ask you a question,  
14 a couple of factual questions about the cooperation.

15 He has not -- John Doe is not currently  
16 cooperating; is that correct?

17 MR. GINGRANDE: That's correct.

18 THE COURT: And the cooperation as I understand  
19 it -- and this is what I want you to tell me. The cooperation  
20 that we're talking about here in this case ended in 2018  
21 sometime. Is that right?

22 MR. GINGRANDE: Yes, I do believe that's correct.

23 THE COURT: Okay. So the cooperation ended before  
24 the indictment was issued in this case, the first indictment?

25 MR. GINGRANDE: No, I'm sorry. Maybe I need to go

1 back on this and correct the record.

2 No, the cooperation in fact -- oh, you're talking  
3 about the indictment as opposed to the grand jury testimony.

4 I would have to refresh my recollection on the  
5 first indictment in this case, your Honor. Could you tell me  
6 what that date was?

7 THE COURT: I know it was 2019. I'm fairly sure.  
8 Attorney Mirhashem, do you know?

9 MR. MIRHASHEM: The date of the indictment?

10 THE COURT: The first -- original indictment.

11 MR. MIRHASHEM: I can check that, your Honor.

12 It looks like the original indictment in this case  
13 appears to have been returned July 10, 2019.

14 THE COURT: Okay. July 2019. Okay.

15 And the cooperation had ended then before the  
16 indictment was issued?

17 MR. GINGRANDE: Well, now we're closer in time to  
18 the grand jury testimony, right? Am I wrong that the grand  
19 jury testimony was in May of 2019?

20 THE COURT: That sounds right if essentially they  
21 issued the indictment a month after.

22 MR. GINGRANDE: Right. So --

23 THE COURT: Or two.

24 MR. GINGRANDE: I'm just trying to confirm it. I'm  
25 trying to pull up the record right now, your Honor, of the

1 cooperation.

2 THE COURT: But he's not currently cooperating.  
3 It's not your typical cooperation case. It's -- if you will,  
4 it is stale cooperation. It's not --

5 MR. GINGRANDE: He's certainly no longer  
6 cooperating, your Honor.

7 THE COURT: Right. And it's not as if you're using  
8 him to prosecute other people on an ongoing basis. That's not  
9 happening, right?

10 MR. GINGRANDE: As far as I'm aware, your Honor,  
11 that's correct.

12 THE COURT: Okay. All right.

13 And the cooperation evidence in the case is  
14 relevant to a prosecutorial misconduct argument, and certainly  
15 Attorney Mirhashem made the argument that this was material  
16 that should have been turned over, this was Brady material in  
17 the Craigue trial, and so ultimately there is a public right  
18 of access argument to be made that the cooperation evidence  
19 that was kept from Attorney Mirhashem and his client is part  
20 of the prosecutorial misconduct that is related to the  
21 payment, giving John Doe money to testify at the grand jury,  
22 those are related.

23 And so that's why I have a hard time completely  
24 wiping the cooperation from the public record, but on the  
25 other hand I see a need to do what I can do to try to protect

1 his name and his identity.

2 I think -- if your argument is accurate that just  
3 the fact that he was a witness in this public trial is going  
4 to identify him because of the nature of the case and other  
5 things that happened in the case, then I'm not sure how I can  
6 properly address that.

7 I do want to hear from Attorney Lothstein, and  
8 obviously, Attorney Brown, I'll let you respond as well and  
9 hear from Attorney Mirhashem.

10 But, Attorney Lothstein, what's your position? You  
11 are on mute.

12 MR. LOTHSTEIN: Thank you.

13 So -- well, your Honor, it's tough because, you  
14 know, John Doe -- I put a Post-It note on my screen to try to  
15 remind myself to say this correctly because I don't like  
16 referring to any client by generic terms.

17 John Doe, as you know from the transcripts and  
18 presiding over this trial, was really a nobody before this all  
19 started in a good way, not in a bad way, but, you know, he was  
20 a nobody. He was a person that did not have a public persona,  
21 a public spotlight on him, and ideally he would like to keep  
22 it that way for obvious reasons.

23 He was roped into this. He was a subpoenaed  
24 witness. He did not want to participate in this trial. The  
25 transcript is painful to read. He certainly didn't sound like



1 a well-prepared witness. I'm surprised he didn't have a  
2 lawyer from the beginning, honestly, when the first questions  
3 on cross-examination are you lied on official forms, on OSHA  
4 forms, and that's a crime, isn't it. So I'm surprised that he  
5 didn't have a lawyer from the beginning even apart from all  
6 the issues about being an informant for the Concord Police  
7 Department.

8 I liked what you said before, your Honor, and  
9 spelling out a number of different things that you're going to  
10 redact to take away context that would identify him just by  
11 his associations or his job, prior jobs and things like that.

12 Because there's been news coverage of this case, I  
13 think John Doe understands that no matter how much you do  
14 that, yes, a good reporter or somebody could try to connect  
15 the dots, but it's hard for me to argue against further -- I  
16 mean, it's hard for me to argue in favor of more redactions  
17 because the level of public interest and the issues in this  
18 case is almost as strong as the level of public interest could  
19 possibly be. I mean, I live here in Concord. Either a  
20 Concord police officer committed just unbelievable misconduct  
21 in giving money to a federal grand jury witness and not  
22 telling the prosecutors about it or the Concord officer told  
23 them and so the attorneys in this hearing right now committed  
24 very serious misconduct.

25 I don't have an opinion which way. I have to hope

1 that it's not Attorney Gingrande and Attorney Davis, but I  
2 have no idea.

3 The point is though that either way -- either way  
4 it's hard to imagine an issue in a criminal justice system  
5 with much more need for the public to know than, you know, and  
6 looking at it in the light most favorable to Attorneys  
7 Gingrande and Davis, that a Concord police officer paid a  
8 federal grand jury witness and didn't tell the federal  
9 prosecutors' office. That is terrible. That is terrible.

10 So it's hard for me to argue for anything more than  
11 you're already offering to do, your Honor, and I appreciate  
12 those redactions to help him remain -- at least chances are to  
13 remain an anonymous person, just another person on the street.

14 THE COURT: Okay. Thank you very much.

15 Let me just say as a person who oversaw the Craigue  
16 trial that I witnessed Attorney Gingrande and Attorney Davis  
17 discover these facts in the middle of the trial and witnessed  
18 their reaction, and I can certainly say that my impression was  
19 they were as shocked as the Court and as Attorney Mirhashem.

20 Now, should they have looked sooner? Should they  
21 have lifted up a rock and looked underneath it? Attorney  
22 Mirhashem says they should have. That there was actually a  
23 document in the file that would have alerted a prosecutor to  
24 do due diligence to look into what was going on between this  
25 witness and the Concord Police Department.

1 I don't in any way mean to suggest that that's  
2 acceptable or that that's not prosecutorial misconduct. That  
3 was a failure of due diligence based on my impression.

4 However, my impression is also that the attorneys  
5 at issue here did not know what had gone on in this case.  
6 Should they have known? Yes. Did they know? I do not think  
7 so.

8 That's beside the point, however. I appreciate  
9 your weighing in on behalf of John Doe.

10 Attorney Brown, would you like to add anything?

11 MS. BROWN: Yes, a couple of things.

12 Attorney Gingrande refers to Roviaro several times,  
13 and I think it's in their pleading. It's really worth  
14 mentioning that that case found that disclosure of the  
15 informant was justified by constitutional consideration. I  
16 know they used boilerplate language about the importance of  
17 protecting informants.

18 And I think the underlying facts of that case are  
19 important too because, and this has been my experience for 30  
20 years, you use an informant as merely an information source  
21 towards other things. Like an informant says, hey, this  
22 person is selling drugs, and then you go set up surveillance  
23 and you take photos, I mean we've all seen those cases, and  
24 then you get independent evidence of the supposed drug dealer  
25 going in and out, whatever it is, then you shouldn't have to

1 turn over the informant because he's not part of your case.

2 But when you send the informants to the drug  
3 deal -- in fact, he's doing the drug deal. In fact, he's the  
4 one who's encouraging the defendant to sell drugs or to sell  
5 more drugs or sell a larger quantity of drugs, and the  
6 defendant is saying, hey, this guy was sucking me in here, now  
7 you've made the informant a part of the case and now you've  
8 made him relevant.

9 That's how I've always read Roviaro and I think  
10 that's what it says. And it's specifically mentioned where  
11 the informant either was a witness in the case or a part of  
12 the crime. That's a different scenario in terms of  
13 confidentiality than merely providing information that leads  
14 to other independent information. I think that's really  
15 important here.

16 As far as the documents that I've received, as far  
17 as I could tell, and I may have missed this, the only thing  
18 that identifies John Doe -- the only case that I can identify  
19 that he was involved with was the Craigue case.

20 So if anyone has some motive towards hurting Mr.  
21 Doe, it would be Mr. Craigue, and my understanding is he knows  
22 that Mr. Doe, you know, was acting as an informant. He had a  
23 front row seat as all of this went down. I'm sure his  
24 attorneys told him about this. So I don't see that there's  
25 anyone else out there in the world who would be having

1 problems with this.

2 But, most importantly, there's a way to protect  
3 this informant. There are ways to redact. Can we always stop  
4 people from making deductions from records and files? No. I  
5 run into that myself. I'll get discovery in a case and it  
6 says informant, and I'll go to my client, do you know who this  
7 guy is, you know. Sometimes they do and sometimes they don't,  
8 you can never a hundred percent protect for that, but this is  
9 a situation where you can protect for it. If people want to  
10 make guesses, they're always going to do that, but I think the  
11 information here is of such an important constitutional  
12 magnitude for not just Mr. Alrai, and that seems to be what  
13 the government was arguing, like, oh, he's got his stuff, he  
14 can go use that.

15 Mr. Alrai filed this motion under two theories.  
16 One, he is a representative of the public. And as a victim  
17 himself of prosecutorial misconduct, he has an interest as a  
18 member of the public of having incidences of prosecutorial  
19 misconduct made public but obviously doing so in a way --  
20 we've always from our first pleading been in favor of  
21 redactions, that that's something that the Court should do.  
22 We don't have any objection to that.

23 And I think that summarizes our arguments.

24 THE COURT: Thank you.

25 Attorney Mirhashem, do you want to say anything?

1                   MR. MIRHASHEM: Your Honor, I would like to say  
2 three things.

3                   The first two I wasn't planning on saying when this  
4 hearing started, but I think I do want to say them now with  
5 respect to the factual record, you know, a lot of time has  
6 passed and, you know, my memory of what happened is certainly  
7 not perfect and I'm sure neither is other people's, but I want  
8 to tell you my best recollection of two facts, neither one of  
9 which really bears strongly on the issue before the Court but  
10 I think it's important for me to say them.

11                  One, I think, as the Court pointed out, the  
12 Department of Labor documentation in this case states that the  
13 agent learned that a Concord Police Department officer had  
14 some form of ongoing relationship with John Doe. So this is  
15 not a situation where an agency that was, like, tangentially  
16 involved in the investigation knew something.

17                  The Department of Labor records, the very records  
18 that Attorney Gingrande and Attorney Davis provided to us,  
19 contained a reference to this relationship between John Doe  
20 and the Concord Police Department.

21                  The second thing I want to say, going back to this  
22 issue of who knew what and Attorney Lothstein's sort of two  
23 scenarios, the facts I think in fact seem to suggest a third  
24 scenario. The document that talks about the cooperation of  
25 John Doe in the form of getting paid for testifying before a

1 federal grand jury states that the Concord police officer  
2 says, and I don't have it in front of me, but essentially says  
3 this is something that he thinks he would have told the  
4 federal agent on the case.

5           So it's not just either Concord police knew and  
6 kept it to themselves or Attorneys Gingrande and Davis knew.  
7 The most plausible scenario seems to be the Concord Police  
8 Department officer told a federal agent that he had paid a  
9 federal grand jury witness, and apparently that federal agent  
10 didn't do anything about it and we don't know if any  
11 disciplinary action or anything else was taken with respect to  
12 that agent.

13           And so these are two facts that I say because  
14 honestly the reason I'm getting into this -- I want the record  
15 on this to be clear in light of the third thing I'm going to  
16 say. My concern is you're going to issue an order that is  
17 going to result in a Concord Monitor article. That article is  
18 going to have quotes from the U.S. Attorney's Office, oh, this  
19 was a Concord Police Department matter and we didn't know  
20 about it. The feds didn't know about it. We had no way to  
21 know about it. That's going to be an inaccurate statement,  
22 and I just want to say up front that those inaccuracies will  
23 in some form have to be corrected.

24           So I'm just reminding us that the facts are not  
25 that this was a separate state agency that, you know, had

1 nothing to do with this case. That Concord police officer's  
2 belief -- although if I remember the report correctly, he  
3 doesn't have a definite actual recollection of telling the  
4 agent, but I think he said in that report that it's the sort  
5 of thing that he would have told the agent.

6 And so those are my factual notes for the record.

7 As far as my position as Mr. Craigue's lawyer, you  
8 know, I think our position has been clear throughout this  
9 litigation that these are weighty issues for the Court to  
10 consider. There's a strong public interest here. There's a  
11 strong interest on behalf of John Doe. There's a strong  
12 interest on behalf of Mr. Alrai.

13 Our client, you know, the case against him was  
14 tried in June, was dismissed in June. He wants to go on with  
15 his life. He's not looking forward to publicity or anything.  
16 So we take no position on exactly what should or should not  
17 be redacted here.

18 Thank you.

19 THE COURT: Okay.

20 MR. LOTHSTEIN: Your Honor, could I say one more  
21 thing or two more things maybe?

22 THE COURT: Go ahead.

23 MR. LOTHSTEIN: Thanks.

24 The first thing I want to say is that although  
25 Donna is right about Roviaro and everything she said, one of



1 the reasons why I think it's important for you to do the  
2 redactions you're talking about is that I have to believe that  
3 if Attorney Davis and Attorney Gingrande did know this full  
4 story they just would have dismissed this case. I mean,  
5 they're very experienced lawyers. It's hard for me to believe  
6 they would take a case to trial if they knew that a grand  
7 jury -- that their star witness or one of their star witnesses  
8 had been paid for grand jury testimony.

9           So if they had dismissed it before trial, then none  
10 of this would ever have been known. So that's a way in which,  
11 you know, John Doe is really an innocent victim here because  
12 he is not someone who signed up to cooperate with Attorney  
13 Gingrande and Attorney Davis with all the risks that comes  
14 with that and with the knowledge that when he testified in  
15 public that all of that would come out. It couldn't be more  
16 different than that.

17           It's much more likely to be a situation where there  
18 never would have been a jury trial if these two attorneys knew  
19 that and of course understanding that they have to disclose it  
20 to the defense.

21           So that's why I think it's important for the Court  
22 to take those extra steps to try to redact as much as possible  
23 to create the context here.

24           And the last thing I want to say -- because I don't  
25 want to be misunderstood by anyone. When I said there's two

1 scenarios, and then Behzad points out correctly I think that  
2 there could be a third scenario, regardless I'm not saying  
3 that they're all equally equal. I mean, I have to believe  
4 that the Concord police officer is just saying something  
5 self-serving when he says I think I would have told them or I  
6 have to believe I would have told them, I don't remember.

7 Look, we'll never know. That's all I meant when I  
8 said I don't have an opinion about this is that I missed all  
9 the key events in this case. I came in to clean up at the  
10 end, thank you for that, your Honor, and I've done the best I  
11 can, but I don't want to be misunderstood that I'm saying that  
12 all those scenarios are equally likely.

13 The only point I'm trying to make is that no matter  
14 how you look at it somebody committed serious misconduct.

15 THE COURT: All right.

16 I have to say my memory is consistent with Attorney  
17 Mirhashem's, and so I want to ask -- Attorney Gingrande, is  
18 what Attorney Mirhashem described, is that consistent with  
19 your memory as well and your understanding of the record?

20 MR. GINGRANDE: No, not at all. And frankly, you  
21 know, I wasn't intending to get into this, your Honor.

22 Again, this is not -- what we're here to discuss is  
23 the motion and the opposition and how to protect a  
24 confidential informant.

25 THE COURT: Excuse me. I know what we're here to

1 discuss, and I am asking you a question, okay?

2 MR. GINGRANDE: Okay.

3 THE COURT: And I remember very clearly that there  
4 was a piece of paper in the file. Attorney Mirhashem referred  
5 to it with frustration repeatedly and he said the document  
6 referenced some sort of relationship between the Concord  
7 Police Department and John Doe, and the reason he was  
8 concerned about it was because John Doe did not want to  
9 cooperate with the government in this case. John Doe was  
10 essentially uncooperative and they needed to bring in this  
11 person who had this close relationship with him to essentially  
12 talk him into coming in, and there was a document that  
13 Attorney Mirhashem described being in the file. Attorney  
14 Mirhashem was relying on the document, if my recollection is  
15 accurate, and he was saying to the Court, Judge, I'm asking  
16 him to follow up on this document, and ultimately Attorney  
17 Davis did.

18 And you know what? That's when ultimately it was  
19 revealed that there was cooperation, there was this CI file at  
20 the Concord PD, and there was this shocking revelation about  
21 the payment to the grand jury.

22 And my recollection with regard to the statements,  
23 and I don't think it is in the record anywhere, but the record  
24 that Attorney Mirhashem described where the current probation  
25 officer, former Concord Police Department officer, is saying

1 he would have told the federal agent, that seems consistent  
2 with my memory of that.

3 You just said that it's not at all close to your  
4 memory. So what is your memory?

5 MR. GINGRANDE: Your Honor, since I'm being asked  
6 directly, I will respond.

7 The date of that document that Behzad just cited is  
8 months, months before John Doe is signed up as a CI and months  
9 before the grand jury testimony that he gave. That  
10 relationship at that time, whatever it may be, was not a  
11 relationship of John Doe being a CI.

12 I'm trying to find the exact dates right now as I  
13 pull this up for what the precise date of that document is,  
14 but I believe the date of that prior relationship -- that  
15 references a prior relationship is March 26th of 2019 in an  
16 interview with John Doe and John Doe is not signed up until  
17 May 16th of 2019.

18 THE COURT: Okay. I'm just a little confused.

19 MR. GINGRANDE: So --

20 THE COURT: Let me stop you.

21 MR. GINGRANDE: Yes.

22 THE COURT: March 26, 2019, John Doe is  
23 interviewed. I never saw these records. I only heard them  
24 referenced so I'm asking you because I don't know, but that  
25 record is an interview with John Doe in March of 2019, right?

1           MR. GINGRANDE: That's a report of an interview in  
2           which this relationship is cited to the best of my  
3           recollection, yes.

4           THE COURT: Okay. Let me ask you though. They  
5           have had a relationship prior to March of 2019 whereby he was  
6           getting paid small amounts of money to be a CI for the Concord  
7           PD, and you told me earlier that you think that ended in 2018  
8           so clearly his relationship predated this March 2019  
9           interview.

10          But it really is beside the point because  
11          ultimately that's what uncovered -- in the middle of the trial  
12          you and Attorney Davis uncovered somehow following up on this  
13          that there was this CI relationship. So that's ultimately  
14          what is important here.

15          And I remember the references to this document, and  
16          Attorney Mirhashem had seen it, it had been provided to him,  
17          and he had been urging the government to follow up on that  
18          document.

19          He didn't file any sort of motion to compel, maybe  
20          I would have granted such a motion, but ultimately he was  
21          asking me to compel the government to look into this and  
22          ultimately you agreed to do it on your own in the middle of  
23          the trial, and that's when you uncovered the CI history as  
24          well as the grand jury testimony.

25          So that's ultimately what's important about this

1 document. No?

2 MR. GINGRANDE: Well, can I respond to that, your  
3 Honor?

4 THE COURT: Yes. Of course.

5 MR. GINGRANDE: So you just quoted me as saying  
6 that I agree that it was in 2018. If you recall, I said at  
7 the time:

8 I think that's right. I might be getting confused.  
9 I know we talked about the grand jury testimony.

10 It turns out that was -- 2019 was the grand jury  
11 testimony, okay?

12 If you look at the documents, the relationship as a  
13 CI happens in 2019, not 2018, and it begins in May of 2019,  
14 not 2018, okay?

15 THE COURT: Well, that's an important --

16 MR. GINGRANDE: So to the extent I agreed to 2018  
17 and led the Court to believe that it was 2018, I do apologize.  
18 No, it was 2019, in May of 2019 when that CI relationship was  
19 established, and it was two months prior, March 26th of 2019,  
20 that the report of the interview saying that they had a  
21 relationship was written.

22 So at the time that that report was written there  
23 was no CI relationship. There was none. And there was no  
24 payment for grand jury testimony because that hadn't even  
25 happened yet. So that's why, your Honor, I'm saying I

1 disagree with Attorney Mirhashem's --

2 THE COURT: It would have been helpful for me to  
3 know that when I was asking you specific facts about when he  
4 was a CI and when it started and when it stopped.

5 So what you're telling me now is an entirely  
6 different set of facts. You're telling me that he was a CI as  
7 of May 2019.

8 So he was a CI and was paid for his grand jury  
9 testimony at around the same time because he testifies in  
10 front of the grand jury for \$80 against Mr. Craigue in July of  
11 2019. So, in essence, he's in this business relationship, if  
12 you will, with the government at the time that the grand jury  
13 is meeting to indict Mr. Craigue.

14 So that in and of itself I think heightens the  
15 level of prosecutorial misconduct at issue here and makes it  
16 even more important that you disclose this to Mr. Craigue's  
17 attorneys, which you did when you found out about it to your  
18 credit.

19 However, I need to know if in fact he's a CI, when  
20 did his CI status end? Was he done cooperating at the time  
21 that he testified in this trial?

22 MR. GINGRANDE: No. So my understanding, your  
23 Honor, is that the first payment that he received, and this is  
24 in -- this is in the DOL report that your Honor has access to  
25 that Attorneys Mirhashem and Graham have access to as well,

1 and now that Attorney Brown has access to, but I believe that  
2 that was the first -- and you just said I think that he  
3 testified in July of 2019 before the grand jury. Is that what  
4 he said?

5 THE COURT: I think that's what you and Attorney  
6 Mirhashem just told me. It was May. It was May and then the  
7 indictment was issued in July.

8 MR. GINGRANDE: Correct.

9 THE COURT: Okay.

10 MR. GINGRANDE: Exactly. So it was May, and that  
11 was the beginning.

12 The CI relationship essentially started with the  
13 payment in May of 2019. And so he testifies for the grand  
14 jury, and then the next -- I think it's the next day he is  
15 paid and it's essentially an inducement. And again, I am  
16 paraphrasing what is in this DOL report that your Honor has  
17 access to and it's on the record. It's an inducement for him  
18 to become a CI.

19 So as it turns out, he did not have an ongoing  
20 relationship of being a CI at the time that he's testifying  
21 for -- at least to the extent that -- you know, he's not  
22 getting paid as a CI at the time that he testified. It's  
23 literally the next day that he is paid for the first time as a  
24 CI. And then going forward from that John Doe -- he, John  
25 Doe, is continuing to be paid as a CI and that lasts for that



1 summer roughly, and then after that John Doe is no longer an  
2 active CI.

3 So again, those are -- that was one of the points  
4 for which I disagree with Attorney Mirhashem because that  
5 relationship did not happen -- the CI did not happen until  
6 later.

7 And then the other response was that -- it was  
8 essentially what Attorney Lothstein said when it comes to this  
9 question of -- this question of John Doe -- or not John Doe,  
10 I'm sorry, of the DOL agent's knowledge of what the police may  
11 have said. That is also spelled out specifically in that DOL  
12 report so we don't have to guess as to what was said, it's in  
13 the report, and the account was that the Concord police think  
14 they must have -- you know, this officer thinks he must have  
15 told the agent that he was paying a confidential informant but  
16 couldn't recall any actual conversation informing him and the  
17 agent -- where he would have told the agent, and then the  
18 agents did not know. At least told us they did not know.

19 So the -- you know, there's been discussion in this  
20 hearing obviously about what we knew, what we should have  
21 known. I just want to say for the record, because these  
22 things did come up, is that the other thing that's been  
23 discussed is diligence in this. Without going into a whole  
24 long discussion about it, you know, I will say personally that  
25 I conducted diligence that I would have thought would have

1 revealed this information, and I was shocked when we did learn  
2 this information in the middle of trial.

3 It is my understanding that my colleagues who were  
4 working on this case longer than I was had also conducted  
5 diligence and yet did not get this information.

6 So of course when Attorney Mirhashem brought it to  
7 our attention and asked us to follow up on this relationship,  
8 ask the questions, at that point that relationship had  
9 transpired. It had become a relationship of a CI. We  
10 followed up, we got that information, and of course we were  
11 going to inquire right away and Attorney Mirhashem wouldn't  
12 have to compel it because we take those obligations seriously.  
13 I'll speak for myself. I take that obligation seriously. And  
14 so we wanted to do that of course to uncover that information  
15 and to comply with our obligations, and obviously it revealed  
16 what it did.

17 And so -- you know, again, I wasn't prepared to  
18 talk about these things today. I think that the issue that  
19 we're talking about, you know, these may be tangentially  
20 related. Certainly they are related, but my concern now is  
21 really what do we do given what transpired and trying to  
22 protect this witness.

23 THE COURT: Well, I need to know if he's a current  
24 CI, when was he a CI. I need to know those things in terms of  
25 my decision here today. So the question of when he stopped

1 being a CI is relevant.

2 What was the relationship then before he was a CI?  
3 How do you characterize that?

4 Attorney Mirhashem.

5 MR. MIRHASHEM: Your Honor, I partially agree with  
6 Attorney Gingrande. So let me just respond, if I may.

7 I think we started down this path because I heard  
8 Attorney Gingrande say -- there was this, you know -- at least  
9 as I heard, and he was suggesting, oh, the Concord Police  
10 Department, they're separate from the Department of Labor.

11 I responded to that by saying in fact the  
12 Department of Labor's own records refer to a relationship  
13 between John Doe and a Concord police officer.

14 Attorney Gingrande is right that if you -- once  
15 they -- my position is Brady required them, Kyles versus  
16 Whitley required them right then and there. Within their  
17 discovery they see that a key prosecution witness had a  
18 relationship with a police department that was involved in  
19 this case. They had a constitutional obligation to inquire  
20 into the nature of that relationship, and they violated Mr.  
21 Craigue's due process rights by failing to make such an  
22 inquiry. That's my position.

23 But as a factual matter, that relationship had it  
24 been inquired to he is right that at that stage was not a  
25 formal payment for a CI relationship.

1           Part of the difficulty here is that we were given  
2 these records and we eyeballed them and returned them. We  
3 don't have any copies of them.

4           So the document that certainly exists is the motion  
5 to seal that I filed the day after the trial was dismissed,  
6 that had the DOL investigative report about the grand jury  
7 testimony. So I agree that that's a very reliable source for  
8 the Court to look at.

9           But as far as the relationship, my recollection --  
10 and Attorney Gingrande may actually have their reports. This  
11 police officer had some sort of a relationship with John Doe  
12 in connection I believe with some drug incidents. However,  
13 John Doe had not been interested in cooperating formally with  
14 the Concord Police Department.

15           For whatever reason on the very day that he  
16 testified before the federal grand jury, he got paid for it  
17 and he started a formal CI relationship with, like, records  
18 that I saw of payments, et cetera.

19           So I think that if I suggested that he was a CI at  
20 the time, that was not my intention. He had some sort of  
21 relationship with this officer, and that should have been  
22 enough for the government to contact the Concord Police  
23 Department and say, you know, what is your connection with  
24 this key prosecution witness. Kyles requires no less than  
25 that.

1           But I'm not suggesting he was an informant at that  
2     time. He became an informant, I think as Attorney Gingrande  
3     indicated, either the day he gave paid federal grand jury  
4     testimony or the day after he gave paid federal grand jury  
5     testimony.

6           THE COURT: Okay. All right.

7           Anybody want to say anything else?

8           MR. GINGRANDE: Your Honor, I would just ask -- I  
9     suppose this is just a question. Assuming the Court does  
10    order redactions for the documents, you know, the government  
11    has agreed to, and I think, you know, this was in our  
12    opposition, to proposed redactions, you know, so we could do  
13    the work and actually redact the documents and submit them for  
14    the Court's approval. Also, of course, open to whatever the  
15    Court may feel appropriate, but I think that the government  
16    has, you know, proposed redactions in its opposition for that  
17    purpose.

18          THE COURT: Okay. All right.

19          Anybody want to say anything else?

20          (No response.)

21          I'll issue an order -- I think as soon as I can in  
22    this issue a decision. It will lay out specifically I think a  
23    procedure, and I think it will be fairly consistent with what  
24    I've told you here would be my goal, which is to redact his  
25    name. To the extent he's referred to, he's referred to as

1 John Doe. To the extent there's any reference to him in a  
2 public document, that will be -- his name will be removed.

3 And I will probably let the government have the  
4 first crack at this and frankly probably make you do the most  
5 work in consultation with Mr. Alrai's counsel, Attorney Brown,  
6 but I'll probably ask you to submit this new proposed set of  
7 redactions within a certain time frame and then I'll give  
8 Attorney Lothstein, Attorney Brown, and Attorney Mirhashem a  
9 short time to object on grounds that it's inconsistent somehow  
10 with the Court's order. And assuming it's not inconsistent,  
11 assuming that all the other attorneys agree that it's  
12 consistent with my order, you can obviously let the Court know  
13 that and then we can get this record cleaned up and it can be  
14 opened up in the manner in which I have described here, and I  
15 think that's probably what I will end up doing.

16 I appreciate counsels' input. I appreciate the  
17 briefing. Unless there's anything anybody wants to say before  
18 we break --

19 MR. MIRHASHEM: I just have one request, your  
20 Honor.

21 In response to the Court's inquiries I think during  
22 this sealed hearing, I and I think others made references to  
23 various matters that are subject to protective orders by this  
24 Court.

25 I know that Mr. Alrai is present during this

1 hearing. So I would just ask that either his counsel or the  
2 Court inform him that these are matters that are confidential  
3 pursuant to the Court's order.

4 THE COURT: Okay. Well, I was hoping that that  
5 would be something Attorney Brown would have made clear to him  
6 before this hearing, she's shaking her head yes, but that is  
7 correct.

8 And to the extent any members or clients are  
9 watching this hearing, this is a sealed proceeding, and I  
10 intend to issue an order, you know, shortly so that the  
11 broader seal that I issued in my most recent order will be  
12 very temporary, and the public will then have access to, you  
13 know, large -- in large part the entirety of the record minus  
14 his name and any other identifying information. That's my  
15 intention.

16 MR. MIRHASHEM: Thank you, your Honor.

17 THE COURT: All right. Thank you.

18 MR. GINGRANDE: I'm sorry, your Honor, could I -- I  
19 apologize.

20 THE COURT: Go ahead. Go ahead.

21 MR. GINGRANDE: I was just going to ask -- the one  
22 other thing that I was just hoping to get some clarity on  
23 regarding this hearing was just the scope of the motion and  
24 the documents, and I don't know if this was already a plan of  
25 yours to include in the motion specifically what the documents

1 are.

2 THE COURT: Yes. Yes, I will.

3 MR. GINGRANDE: The government has tried to put  
4 forward what it thinks is the full scope of documents, but it  
5 would certainly be helpful to get some guidance from the Court  
6 on that.

7 THE COURT: I will lay that out for you in the  
8 order what I believe to be the entirety of the orders and  
9 transcripts that we're talking about in this case.

10 MR. GINGRANDE: Okay.

11 THE COURT: I could certainly summarize that for  
12 you now, but my guess is that you would not necessarily be  
13 able to or want to absorb that level of detail right now, but  
14 if I'm wrong about that, I can certainly list them for you.

15 MR. GINGRANDE: That's okay.

16 THE COURT: All right. I'll include that in my  
17 order.

18 Thank you, counsel, and Court is adjourned.

19 (Conclusion of hearing at 4:45 p.m.)  
20  
21  
22  
23  
24  
25



## C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 12-13-21      /s/ Susan M. Bateman  
SUSAN M. BATEMAN, RPR, CRR